## APPENDIX "A".

### Opinion of the Court of Appeal.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Thomas Skala, Jeffrey Altman, Defendants-Appellants. Nos. 81-1373, 81-1416. D.C. No. CR 80-788-2-RJK.

Filed: July 27, 1982.

MEMORANDUM

Appeal from the United States District Court for the Central District of California.

Robert J. Kelleher, District Judge, Presiding.

Argued and submitted April 7, 1982.

Before: CHAMBERS, WALLACE and NORRIS, Circuit Judges.

Skala and Altman were convicted, after jury trial, of twenty counts of mail fraud (18 U.S.C. §1341) and they appeal asserting, among other things, that there was insufficient evidence to support their convictions. The essential elements of mail fraud are 1) a scheme or artifice to defraud, and 2) knowing use of the mails in the execution of that scheme or artifice. In pressing their arguments that the evidence was insufficient, appellants are bound by the well-established rule that the evidence is viewed, on appeal, in a light most favorable to the appellee — the government. *Glasser v. United States*, 315 U.S. 60 (1942). Moreover, we draw all reasonable inferences from the evidence in favor of the government. *United States v. Beecroft*, 608 F.2d 753, 756 (9th Cir. 1979). Given these ground rules, we have no hesitation in concluding that there was ample evidence to support these convictions. There is no real question but that the mails were used in the effort which was undertaken and which the government charged as being fraudulent. The

question on appeal is whether the evidence supported the jury's conclusion that the effort was indeed a fraudulent one, and that these two individuals participated in the scheme and had the requisite intent.

Skala was president of MCB Systems and Altman was secretary-treasurer. Through their efforts MCB Systems acquired Lexington Corporation which had published a book entitled "The Big Book of Banking and Industry" ("BBBI") Pector was aware that the book was not in existence and that no ads had as yet been ordered for inclusion in it. Nevertheless, using an alias, she called each victim company saying she was "verifying" its order for an ad. She also obtained the names of officials in the company. An invoice was then made up, addressed to an official for the unordered (but theoretically "verified") ad and placed in the mail. Included with the invoice was a document entitled "Big Book of Banking and Industry Information Statement," saying the "Big Book" had been published since 1971 and that the new seventh edition would be even bigger and better than the preceeding editions.

Addressees who requested further information as to the purported orders for the ads were given the names of other officials in the same companies and told the orders had been placed at earlier dates. Some were told that their "confusion" might be due to the fact that BBBI had formerly been published under another name. Several addressees did not bother with such inquiries but simply protested and reported the billing to the Better Business Bureau, the state attorney general, or the postal authorities.

Skala was informed of some of the protests but despite this knowledge he made the decision in August 1976 to send out computerized mailings to all whose accounts were "delinquent," threatening the cancellation of credit to "valued customers." A second similar mailing was later

sent out. The addressees included many victims who had unwittingly paid for the ads and many others who had denied having ordered any ad and had refused to pay.

By November 1976, appellants divested themselves of their interest in the Metalworking Machinery book and also the BBBI. A fictitious straw man, whom appellants named Yashika Mitsibishi, was shown as the owner in the sale to the new buyer. Part of the sales agreement was that the accounts receivable for BBBI were transferred to the new owner.

This record, particularly when read in the light of the presumptions available to the government on appeal, clearly supports the jury's conclusion that a scheme to defraud existed. Pector's sales pitch was untruthful whether or not the appellants intended to publish the BBBI. Moreover, their protestations that they had a good faith intent to publish it could, on this record, be rejected by the jury. The BBBI had not been published when the unordered ads were "verified," or when the invoices were sent out, or when the "Information Sheet" was distributed, or when the untruthful "explanations" were given to the inquiring addressees, or when the delinquency notices were sent out. Indeed the BBBI was never published by appellants and the evidence they offered of their intent to do so was very flimsy; the jury was entitled to disbelieve it. They offered little, if any, evidence of any sales activity that was not fraudulent. The best that could be offered was Pector's statement that she did not make untruthful statements to "every" customer.

Evidence to support the charge of appellants' participation in the scheme was largely circumstantial, which is not unusual in mail fraud cases. Appellants had financial control and were the controlling officers in the organization that was purporting to publish the BBBI and was accepting payments for the unordered ads in the nonexistent book. As

noted above, they offered practically no evidence that would support their claim that they intended to publish it. They hired Pector and obviously they had the right to fire her. But even after discontinuing the telephone solicitation effort, they kept her on and used her in collections work associated with the delinquency notices. Skala was aware of the receipt of protests from victims and yet he devised the computerized delinquency mailing program. Altman saw the invoices and knew of the contents of the very misleading "Information Statement" that was sent to the victims. But despite their knowledge, neither appellant took action to correct the situation. There is evidence they were present in Pector's office at times when she was making her fraudulent sales pitch and using her alias. There is evidence of the use of the alias in written materials mailed to the victims. But neither appellant did anything to correct the situation.

Intent to defraud may be inferred from knowledge that a scheme operates in a deceitful manner. *United States v. Beecroft, supra*, 608 F.2d at 759; *United States v. Piepgrass*, 425 F.2d 194, 199 (9th Cir. 1970). It may also be inferred from failure to put a stop to a deceitful scheme. *United States v. Kaplan*, 554 F.2d 958 (9th Cir. 1977). The use of an alias and of "fabricated excuses" may be circumstantial evidence of conscious deception. *United States v. Pearlstein*, 576 F.2d 531, 535 (3rd Cir. 1978). On this record there was more than enough evidence to support the jury's finding of a deceitful scheme and of appellants' participation in it. The jury was entitled to discount appellants' defenses of good intent to publish the BBBI, of lack of knowledge of Pector's activities, and of lack of ability to control Pector. Their reliance on *United States v. Pearlstein*, supra, is misplaced. There the defendants were agents of principals and it was the principals who were charged with

devising and operating the deceitful scheme. The factual situation here is clearly distinguishable.

Appellants argue that the proof adduced at the trial was at variance with the scheme as alleged in the indictment. The basis of this argument appears to be that Pector, while indicted with the appellants, had pleaded guilty when she testified at their trial. It is appellants' contention that the indictment's allegations that all appellants participated in the scheme could not now be proven. They argue that the appellants were, in fact, convicted on the basis of a theory that they ratified Pector's activities by sending the computerized delinquency notices as a preliminary to selling the BBBI. There is sufficient evidence in the record to convict each appellant and it is irrelevant that Pector was not tried with them. The indictment charges a variety of actions that constituted part of the scheme of artifice. It was not necessary to prove each allegation in order to convict appellants. See *United States v. Beecroft*, supra, 608 F.2d at 757. Moreover, any variance that might have existed was not material. Neither appellant can claim that he was inadequately informed of the charges and thus was unable to prepare his defense. The record refutes such a claim.

Appellants also argue that there was reversible error in the trial judge's decision to permit introduction of a large number of records and receipts, and many checks, in an attempt to demonstrate that appellants' companies had not spent any sums in an effort to publish the BBBI. Although all checks in an amount over $100 were subpoenaed, only about three-quarters of them were obtained. The decision to admit the materials was within the trial judge's discretion under Rule 403, Federal Rules of Evidence. Similarly, it was within the trial judge's discretion to permit the use of summary charts, particularly where, as here, the jury was given a cautionary instruction as to their use. We find no

suggestion on this record that the trial judge abused his discretion.

Finally, there was apparently some violation of the attorney-client privilege in the grand jury phase of this case but the trial judge considered all the instances of claimed violation in the light of the attorney's dual capacity as an officer of Lexington, and in the light of the circumstances under which the communications were made, many of which were not "confidential" at all. The judge's careful review of the situation resulted in his order suppressing some communications and not suppressing others. We have reviewed the record and we find no abuse of discretion on his part. The dismissal of an indictment is a very drastic sanction and there was not the overreaching and deception in this case that would have compelled such a sanction. See *United States v. Thompson*, 576 F.2d 784 (9th Cir. 1978).

Affirmed.

## APPENDIX "B".

### Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Jeffrey Altman, Defendant-Appellant. No. 81-1416.

Filed: November 30, 1982.

ORDER APPROVING SUBSTITUTION OF COUNSEL AND DENYING REHEARING

Before: CHAMBERS, WALLACE and NORRIS, Circuit Judges.

The stipulation for substitution of counsel for appellant Altman is approved.

The petition for rehearing is denied.